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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 436

IN THE MATTER

of

UNITED CIGAR STORES COMPANY OF AMERICA,

Debtor,

JOSEPH E. OTIS ESTATE LAND TRUST, *et al.*,

Petitioners,

against

IRVING TRUST COMPANY, as Trustee of the Estate of United Cigar Stores Company of America, Debtor, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT TRUSTEE

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BRIEF FOR RESPONDENT TRUSTEE

OPINIONS BELOW

The opinion of the Special Master appears on page 324 of the record and is not reported: The District Court affirmed without opinion (R. 337). The opinion of the Circuit Court of Appeals is reported in 83 F. (2d) 202, the dissenting opinion of Judge A. N. Hand appearing at page 206. The opinion of the Circuit Court of Appeals on its denial of a rehearing is reported in 85 F. (2d) 11.

STATUTE INVOLVED

The provisions of Section 77B(b) of the Bankruptcy Act dealing with landlords' claims are set forth in the Appendix to this brief.

OUTLINE OF CASE

This case involves claims for future rent asserted under Section 77B of the Bankruptcy Act by nine former landlords of United Cigar Stores Company of America, a New Jersey corporation (hereinafter called the Debtor).

At the commencement of the Debtor's bankruptcy on August 29, 1932, the Trustee in Bankruptcy was faced with the heavy task of dealing with approximately 1,000 leases, most of which were burdensome (R. 262). The problem was resolved by the preparation of various forms of agreement with various classes of landlords, of which the forms involved in this case provided for an assignment of the lease itself and the subleases (including rentals due from subtenants) by the Trustee *and by the Debtor*, for the assumption of the obligations under the lease by the landlord himself, and for the release by the landlord of the Trustee, the Debtor and the Debtor's bankrupt estate (R. 41). It was desirable from the landlord's point of view that he be relieved from undertaking dispossess or other common law proceedings to end the term as against the Debtor itself, and that he obtain the sub-tenancies which otherwise would revert to the Debtor upon rejection by the Trustee. Accordingly, participation by the Debtor in the negotiations was not a mere formality. The Debtor was represented by its own counsel (R. 277 *et seq.*), and ex-

acted and received in all cases a release running to itself (R. 271). In certain cases *this release* was qualified by a rider; and the meaning of that rider provides the distinctive question in the nine claims involved in this case. All of the agreements executed by the petitioners were entered into between October 19, 1932, and December 3, 1932.

About a year and a half later Section 77B was enacted (June 9, 1934), and the Debtor filed its petition for reorganization thereunder. Among those who filed claims in the 77B proceedings were 94 claimants, whose claims have successively been ordered expunged by the Referee in Bankruptcy (sitting as Special Master), the District Court, and the Circuit Court of Appeals (one judge dissenting), on the grounds that the claimants had, prior to Section 77B, contracted away their rights against the Debtor and that Congress had not, by Section 77B, given them new rights. Nine of these claimants (herein referred to as the petitioners) have now been granted writs.

ISSUES PRESENTED

The respondent Trustee agrees with the petitioners that there are two principal issues presented:

> *First,* whether a claim may be presented by a landlord in a 77B proceeding where there is no liability under the substantive law of landlord and tenant due to the prior termination of the lease and release of the tenant; and
>
> *Second,* whether the claims in this case have been released, notwithstanding the effect of the rider purporting to qualify the release.

The first question is the same that has been presented in the preceding case, *In the Matter of United Cigar Stores Company of America, City Bank Farmers Trust Company* v. *Irving Trust Company,* No. 260, where the Debtor's liability was terminated prior to Section 77B by constructive surrender rather than by express surrender and release, as is the situation in this case.

The second question lurks in the record in the next preceding case, *In the Matter of United Cigar Stores Company of America, Meadows* v. *Irving Trust Company,* No. 151, although the effect of the qualifying rider was not expressly considered by the Circuit Court of Appeals in that case.

Argument as to the first point will have been fully made in respondent's brief in the *City Bank Farmers* case, No. 260, and will not be repeated herein. On the second point, the principal argument was reserved in respondent's brief in the *Meadows* case, No. 151, so that it might be fully presented herein.

DETAILED STATEMENT OF FACTS

Each of the petitioners had, prior to the Debtor's adjudication in bankruptcy on August 29, 1932, made leases to the Debtor of real property part of which was occupied by one of the Debtor's cigar stores and the balance sublet to others.[1] All nine leases were found burdensome by the Trustee in Bankruptcy who was thereupon authorized by the Referee (now the Special Master below) either to reject the leases or, in lieu thereof and at the landlord's election, to assign them back to the landlords together with the sub-

[1]R. 59, 80, 100, 169, 182, 193, 222, 232 and 234.

leases thereunder. Each of the petitioners chose to take assignments,[2] and agreements so providing were accordingly entered into during the months of October, November and December, 1932.[3] The agreements were on printed forms, devised by the Trustee to standardize the procedure in dealing with the one thousand or more leases under which the Debtor was tenant (R. 262), and each agreement made provision for[4]

> (i) the assignment of the lease and subleases to the landlord[5] together with any unpaid rents accrued or to accrue from subtenants after September 1, 1932 (the first rent day after the adjudication) (R. 42);
>
> (ii) the turn-over by the Trustee of rents collected by it prior to the assignment (R. 42);
>
> (iii) the assumption by the landlord of all existing and future obligations required under the terms of the lease or the subleases to be performed by the Debtor (R. 43); and

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[2]In 4 instances the assignments were not requested by the landlords until after the Trustee had rejected the leases, so that in these cases the assignments were made by the Debtor alone (R. 84, 187, 236 and 249). In the other 5 cases no rejection ever occurred, the assignment being made by the Trustee and Debtor acting jointly (R. 74, 150, 177, 213 and 236).

[3]R. 73, 83, 149, 176, 186, 212, 225, 235 and 248.

[4]The record references that follow are to the standard form of agreement executed by eight of the petitioners, the only change being that in the cases where the lease had been rejected prior to assignment, there was no provision for the Trustee joining in the assignment (Note 2, *supra*). The form of agreement entered into by the ninth petitioner (Brown) appears at R. 51.

[5]In the *Brown* case the assignment of the lease ran to the landlord's nominee (R. 212-221).

(iv) a general release in favor of the Trustee, the bankrupt estate and the Debtor

> "from any and all liability of any nature with respect to the Lease and said agreements of sublease hereby assigned and with respect to the Premises, including, but without limitation of the generality of the foregoing, any and all claims on the part of the Landlord in respect of rent, * * *" (R. 43)

to which was added a typewritten rider stating that nothing in the release should

> "be deemed a waiver by the Landlord of the right to prove against the Bankrupt estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled * * *" (R. 76).[6]

All of the agreements so entered into were fully consummated, and the petitioners have retained whatever benefits they received.

Some eighteen months later, Section 77B was enacted, and the Debtor filed its petition for reorganization thereunder. Thereafter, notwithstanding the terms of the agreements which they had entered into with the Debtor, the petitioners each filed claims, using the statutory terminology, "for injury resulting from the rejection of an unexpired lease" or "for damages or indemnity under a covenant contained in such lease". The Reorganization Trustee (joined in by the Debentureholders and Preferred Stockholders Committees and a landlord intervenor) objected to every claim as without merit, upon the ground that not one

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[6]In the case of *Munk* the rider modified the assumption provision as well as the release provision, and in the *Rubel* and *Livingston* cases the rider was applicable to the entire agreement.

of the petitioners was a creditor of the Debtor when Section 77B became law.

SUMMARY OF ARGUMENT

I

We have argued in the preceding case, *In re United Cigar Stores Company of America, City Bank Farmers Trust Company* v. *Irving Trust Company, No. 260,* that Section 77B did not *create* claims where none existed. So where a landlord has accepted a surrender of his lease from the Debtor, or assumed the Debtor's executory obligations thereunder, or released the Debtor from further liability, no claim could thereafter be asserted by the landlord under his lease, except such as had been expressly reserved in the agreement providing for the assignment, assumption or release.

All of the petitioners in this case are landlords in this situation, except that each contends that he effected such a reservation by means of a rider to his agreement with the Debtor. The major question, common to the cases of all nine petitioners, is therefore the interpretation of the rider.

The cases come here upon concurrent findings by two courts below to the effect that the intention of the parties, in employing this rider, was to reserve claims that might be allowed under the Bankruptcy Act as it then stood, but not as it might be amended in the future. It is an established rule in this Court that concurrent findings of two courts below will not be disturbed unless clearly erroneous.

Passing to the merits of the controversy:

It is the respondent's position that the provisions of the rider were intended only to reserve, and had the effect only of reserving, the right to prove *then* existing claims, and that the rider was neither intended to preserve, nor could it have had the effect of preserving, a power in the petitioners to assert other claims of a character not then contemplated but which might be provided for by subsequent bankruptcy legislation. The respondent submits that the language employed in the rider, whether construed *verbatim* or in its context, indicates that the parties must have intended only to reserve existing claims. Certainly, the language does not expressly reserve such claims as might be created by future legislation. At the least, therefore, the general creditors and stockholders of the Debtor are entitled to have this question determined upon a construction of the clause in the light of the circumstances existing at the time of its use.

The various agreements were executed between October and December of 1932. During that period no legislation was pending in Congress looking to the recognition of landlords' claims other than those already provable in bankruptcy. On the other hand, there were certain types of claims which were then definitely recognized as provable, or might then be claimed under existing law by these landlords. *First,* at least six of these landlords had claims for back rent (in the form of taxes) accrued but unpaid by the Debtor; and in fact they subsequently proved these claims in the bankruptcy proceedings and were paid dividends thereon. Without the rider, such claims would have been released. *Second,* it was then understood that landlords' claims for future rent might possibly be determined to be

provable by judicial decision, through application of the anticipatory breach doctrine, *cf. Central Trust Company* v. *Chicago Auditorium Association,* 240 U. S. 581. This question was not authoritatively settled until the decision of this Court in *Manhattan Properties Inc.* v. *Irving Trust Company,* 291 U. S. 320.

In inserting the riders, the parties did not delete the release provision itself. Every provision in a contract must be given a meaning. The meaning of the release provision (when read together with the rider) is that the landlord released the Trustee, the bankrupt estate, and the Bankrupt [the Debtor] from all claims which might arise in the future, while reserving claims already existent. Were the qualifying rider to be construed as petitioners desire, *i.e.,* as reserving the right to prove all claims either then existing or which might arise in the future (by legislation or otherwise), the release provision itself would be entirely nullified.

Finally, had it been desired to reserve the right to prove such claims of an entirely new character as might be created by subsequent statute, that intention could easily have been expressed; but it was not.

II

All of the foregoing arguments apply to *all* of the petitioners. The following arguments apply to seven of the nine petitioners, *i.e.,* all except *Rubel* and *Livingston.*

In the cases of these seven petitioners, the rider qualified *only* the release clause, but did not qualify the clauses by which the landlords accepted assignments of their leases

from the Debtor.[7] Accordingly, in those seven cases, even if we are wrong in our first point, the petitions must be dismissed if we were right in our contentions in the *City Bank Farmers Trust Company* case, *No. 260.*

The petitioners suggest that, notwithstanding that the rider expressly does not qualify the assignment provision (in seven cases), or the assumption provision (in six cases), it should be construed to do so contrary to its terms, because otherwise it would serve no purpose. The suggestion, although in conflict with the express language of the agreement, might perhaps be sound if, in fact, the release clause served no purpose beyond that accomplished by the assignment and assumption clauses. However, the release clause did accomplish this additional purpose; that, although the assignment and assumption provisions alone would have left the landlord entitled to prove existing claims, these also were discharged by the release clause. To attach a qualifying rider to the release clause, was therefore to preserve existing claims.

III

It is unnecessary to consider the argument of the petitioners as to the meaning of the statutory provision for injury resulting from "rejection" of their leases, for,

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[7]In six of the seven cases (all except *Munk*), the rider was also not expressed to qualify the agreement by which the landlord undertook to assume all of the obligations of the Debtor under the lease. But as it is the assignment agreement that constitutes surrender by the Debtor and acceptance thereof by the landlord, with the effect of terminating the lease, the *Munk* claim is in no different position than the other six claims as to which the assignment provision was not qualified.

although in five of these cases the leases were rejected by the Trustee, no claim for injury therefrom survived to the enactment of Section 77B because of the execution and performance in the interim of the assignment, assumption and release agreements. Our position is the same as in the next preceding case, *City Bank Farmers Trust Company* v. *Irving Trust Company,* No. 260, the only difference being that in that case the surrender occurred as a result of conduct of the landlord and in this case the surrender was by express agreement.

ARGUMENT

POINT I

THE PARAMOUNT QUESTION TO BE DETERMINED IS THE INTENT OF TWO PARTIES TO A CONTRACT (THE DEBTOR AND THE LANDLORD), AND AS THE TWO COURTS BELOW MADE THE SAME FINDING ON THIS SUBJECT, THE RULE APPLIES THAT THIS COURT WILL NOT DISTURB THE FINDING UNLESS CLEARLY ERRONEOUS.

As pointed out in the Summary of Argument, the principal question in this case is the construction of a particular provision in a contract (the so-called qualifying rider), interpreted in the light of the intention of the parties and the surrounding circumstances at the time of its execution. Both courts below (one judge dissenting in the Circuit Court of Appeals) concurred in the conclusion that the rider referred, and was intended by the parties only to refer, to such claims as might be provable by the parties under the Bankruptcy Act as it existed at the time that the con-

tract was made (1932). In such a case, it is a firmly established doctrine in this Court that, before this Court will reverse the two concurring lower courts, the petitioner must sustain the burden of showing that such courts were clearly erroneous in the inferences which they drew from the undisputed facts. The affirmation of the holding of the courts below would represent merely the application of

> "* * * the familiar principle, repeatedly applied in our decisions, that the concurrent findings of the courts below will be accepted by this court 'unless clear error is shown' ".. *Radio Corporation* v. *Radio Engineering Laboratories*, 293 U. S. 1, 6.

It is well established that not only findings of fact, but the inferences gathered from them by the lower courts, will not be disturbed unless clearly erroneous. *United States* v. *Commercial Credit Co., Inc.*, 286 U. S. 63, 67; *Continental Illinois Nat. Bank & T. Co.* v. *Chicago, etc. R. Co.*, 294 U. S. 648, 678; *Texas & N. O. R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 558; *Washington Securities Co.* v. *United States*, 234 U. S. 76, 78.

POINT II

THE QUALIFYING RIDERS DID NOT HAVE THE EFFECT OF RESERVING TO THE PETITIONERS THE RIGHT TO ASSERT CLAIMS NOT AT THE TIME PROVABLE, BUT WHICH MIGHT BE MADE SO BY SUBSEQUENT LEGISLATION.

The petitioners urge that the effect of the qualifying rider was not only to preserve whatever claims they could prove under the bankruptcy law as it then (in 1932) stood,

but also to obtain for them the advantage of any change in the bankruptcy law which Congress might make in the future. A majority of the court below held, however, that in the light of surrounding circumstances this was not "the natural and reasonable meaning of the language used".

The accepted guides of interpretation are not subject to dispute. First must be considered the language actually used which, in the absence of ambiguity, of course, controls (*Atwater* v. *Guernsey*, 254 U. S. 423). Secondly, the terminology employed in the instrument must be "read in the light of the circumstances existing at the time of negotiations leading up to its execution" (*Miller* v. *Robertson*, 266 U. S. 243, 251). Thirdly, the particular provisions are to be construed in their context, so that all the terms of the contract may, if possible, be harmonized and given effect (*Green County* v. *Quinlan*, 211 U. S. 582, 594). Finally, a court is not free "either to disregard words used by the parties, descriptive of the subject matter, or of any material incident, or to insert words which the parties have not made use of" (*Harrison* v. *Fortlage*, 161 U. S. 57, 63).

Before discussing whether these canons of construction were correctly applied below to the facts at hand, it should be noted that the interpretation contended for by the petitioners has been overruled not only by a majority of the Circuit Court of Appeals but also by the Special Master, whose conclusions as trial judge were based not only on the record before him but also on facts of which he, as the Referee in charge of the prior bankruptcy proceedings of the Debtor, had knowledge and very properly took judicial notice.

As stated by this Court in *Sand Filtration Corporation* v. *Cowardin*, 213 U. S. 360, 364:

> "The object of construction is to effectuate the intention of the parties in making a given contract. When the contract is in writing the language used should be interpreted in the light of the circumstances surrounding the parties at the time the contract was made. * * *"

See also *Mobile & Montgomery Ry. Co.* v. *Jurey*, 111 U. S. 584, 592; *Union Pacific Ry. Co.* v. *Chicago, etc. Ry. Co.*, 163 U. S. 564, 582.

The Special Master's findings are, of course, presumptively correct under Rule XLVII of the General Orders in Bankruptcy of this Court.

(A) The language used in the qualifying riders.

The rider in question was expressed as negativing a waiver by each petitioner of

> "the right to prove against the Bankrupt Estate any provable claims to which the Bankruptcy Court may adjudge the Landlord *is* entitled, but this shall not be deemed to render any claim a provable claim which *is* not otherwise such or relieve the Landlord from the necessity of proving and obtaining the allowance of any such claim or preclude the Trustee from contesting such proving or allowance." (Italics inserted.)

If we put ourselves (as we must) in the situation of the parties at the time—the fall of 1932—when the releases were given, it becomes evident that the bankruptcy terminology employed in the qualifying rider was used with its then current meaning.

> " * * * It is not to be assumed, therefore, that the comprehensive phrases of the lease, all of which

were quite germane and appropriate to existing conditions, were intended to apply to future events not then in contemplation." *Herald Square Realty Co.* v. *Saks & Co.*, 215 N. Y. 427, 431.

What the petitioners are doing, however, is construing the words in a sense which they could only have acquired a year and a half later when Section 77B was enacted, *i.e.* the words "the bankrupt estate" to mean "the *Debtor's* estate", the words "*is* entitled" to mean "is or *hereafter may become* entitled", and the words "Trustee in Bankruptcy" to mean "*Trustee in reorganization proceedings*". To determine whether such a construction is justified, we must look at the context of the language and the circumstances surrounding its use.

(B) The context of the qualifying riders.

To give effect to the interpretation being urged by the petitioners, a court would be required not only to do violence to the language chosen but also to disregard the setting in which such language was used.

The general release runs in favor of three different parties:

(*i*) Irving Trust Company individually, and in its capacity as Receiver, and as Trustee in Bankruptcy of United Cigar Stores Company of America,

(*ii*) the bankrupt estate, and

(*iii*) the Bankrupt.

The qualifying rider, however, applies only to claims provable against *the bankrupt estate.*

In other words, the rider does not apply at all to the release of claims against "the Bankrupt". Yet the whole case is concerned with the question as to whether, now that "the Bankrupt" has become "the Debtor" and its stockholders have become entitled to rights in reorganization proceedings, the landlord has a claim which he would not have had prior to Section 77B. It is impossible to discern any meaning which can be given to the release of "the Bankrupt",—which release is expressly *not* qualified by the "rider",—unless it be to release such claims as might be asserted against the Debtor and the interests of its stockholders.

(C) The circumstances surrounding the execution of the releases.

By the preponderance of the evidence as to surrounding circumstances, the petitioners, the Debtor and the Trustee in Bankruptcy were contracting with a view to two situations which were recognized by all the parties as being affected by the general release unqualified; namely, (1) the back taxes which the Debtor owed as rent, and (2) the uncertainty as to the provability of future rent claims under the then subsisting law.

(i) *The application of the qualifying riders to claims for taxes accrued and unpaid.*

It cannot be denied that most of the petitioners, having made net leases under which the Debtor was obligated to pay taxes, had foremost in mind recovering accrued but unpaid taxes. So runs the only testimony for the petitioners on this point (R. 308). Indeed, six out of the nine petitioners subsequently did file and were allowed claims

(on which 50% in dividends was paid) which would have been subject to disallowance if the releases granted by them had not been qualified to except provable claims.[8]

From the standpoint of the Trustee, there is no question but that the reservation was intended primarily to protect claims for unpaid taxes which had accrued prior to bankruptcy. This is evident both from the testimony of the Trustee's representative at the trial (R. 271) and from the written instructions issued by the Trustee to its representatives contemporaneously with the negotiation of the assignment agreements (R. 19).

From the standpoint of the Debtor, the rider had the same significance. Although the general release of the Debtor had been inserted at the insistence of its own officers and counsel (R. 271, 281), the Debtor could obviously not object to landlords proving claims for debts allowable under the law as it then stood, for the Debtor would thereby be discharged therefrom, and its only real concern was as to a possible ultimate composition or reorganization.

(ii) *The application of the qualifying riders to future rent claims.*

The parties to the release agreements had also in mind the possibility of future rent claims being treated as provable debts under the law as it then stood. Admittedly, the weight of authority in the lower federal courts was to the contrary, but it was not until February, 1934, that this Court finally ruled (in a case growing out of this very proceeding) against the provability in bankruptcy of claims

[8]The same is true of every one of the ten landlords who appeared below as *amici curiae* in support of the petitioner's cause.

for future rent (*Manhattan Properties, Inc.* v. *Irving Trust Co.*, 291 U. S. 320). Without excepting "provable claims" from the release, no landlord would have been in a position to urge subsequently (as the petitioner *Whitcomb* actually did—R. 320) that the doctrine enunciated by this Court in *Central Trust Company* v. *Chicago Auditorium Association*, 240 U. S. 581,—*i.e.* allowing damages for anticipatory breach through bankruptcy of a personal contract—should be applied to leases of real property.

(iii) *Inconsistency of the theory that the riders were intended to nullify the release provisions to which they were attached.*

Not only does the construction of the qualifying rider contended for by the petitioners put the rider in direct conflict with the terms of the agreement which it was supposed to modify, but it is wholly at odds with the natural probabilities of the situation. For example, there is no reason in the world why, having once insisted upon a general release, the Debtor should have later consented to the addition of a qualifying rider which nullified the release.

Any such conflicting result was in fact expressly provided against by the additional clause in the rider that it should "not be deemed to render any claim a provable claim which *is* not otherwise such".

(iv) *No legislation on the subject of landlords' claims was pending in Congress at the time.*

As a matter of fact, although the petitioners' brief suggests (at p. 29), and the dissenting judge below found (R. 377), that "remedial legislation" as to landlords' claims

was under consideration by Congress at the time that these assignment and release agreements were being negotiated and executed, such was not the fact.

The agreements were executed between October 19, 1932 and December 3, 1932. At that time, proposed legislation looking to amendment of the Bankruptcy Act with a view to the adoption of reorganization provisions of the same *general* character as those later incorporated in Section 77B, was before the Congress. However, *none of the bills then before Congress contained any provision relating to landlords' claims.*[9] It was not until December 29, 1932, that Representative McKeown introduced a bill (H. R. 13995) providing generally that all claims of whatever character against the Debtor or its property should be provable in the reorganization proceedings provided for by such bill, whether or not such claims would otherwise constitute provable claims under the Bankruptcy Act. This bill was subsequently reintroduced on January 10, 1933, as H. R. 14133, and was thereafter combined with H. R. 14359, the bill which eventually became Sections 73 to 77 of the Bankruptcy Act. The corporate reorganization section contained in the bill last mentioned was dropped in the Senate, however, to expedite passage of the other provisions before adjournment of the 72nd Congress in March, 1933.

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[9]On February 24, 1932, Senator Hastings had introduced a bill (S. 3886) for amending the Bankruptcy Act to provide for corporate reorganizations. A similar bill (H. R. 9968) was introduced by Representative Michener on March 1, 1932, and on June 15, 1932, Senator Hastings introduced still a further bill on the same subject (S. 4921). None of these bills made reference to future rent claims.

The language in these riders had been adopted by the Trustee early in October, 1932 (R. 149) and, of course, referred to "the law then in force" (*McCullough* v. *Virginia*, 172 U. S. 102, 112). This same language followed in all riders used thereafter. The petitioners themselves make a point of this, arguing (at p. 23 of their brief) that; because the Trustee adopted the language, it should be construed against the Trustee. But, however construed, it was written at a time and in the light of circumstances three months prior to the first introduction in Congress of any bill relating to the provability of landlords' claims in bankruptcy or reorganization proceedings.[10] Indeed, the petitioners' brief, notwithstanding the emphasis placed upon future legislation, finally recognizes that there were no amendments to the Bankruptcy Act affecting landlords then

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[10]On January 5, 1933, Representative Celler introduced a bill (H. R. 14062) for amending Section 63 of the Bankruptcy Act to make provable future rent claims by providing that an adjudication in bankruptcy should constitute an anticipatory breach of the unexpired leases of the bankrupt. The petitioners' brief in another connection (at p. 15) refers to the remarks of Congressman Celler with regard to this bill made on January 6, 1933 (76 Cong. Rec., Part II, p. 1518):

> "Mr. Speaker, I have introduced a bill to amend the bankruptcy act to prevent the *recurrence* of such scandals as grew out of the United Cigar Stores bankruptcy.
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> * * * * * * * *
>
> "In the United Cigar Stores bankruptcy the Irving Trust Co. countenances this enforced *cancelation* in the case of 860 leases * * *."

Implicit in these remarks is the assumption that the United Cigar landlords had irrevocably lost their rights to relief, due to the character of the existing law, and that the cancellation of such leases was a *fait accompli*.

pending at the time when the qualified releases were given, but claims that "it was generally believed" that there *would be* amendments "which would include relief for landlord creditors". The petitioners submit no facts, either within or outside the record, to support this statement of "general belief"; and we emphatically deny it.

Indeed, until February, 1934, when this Court decided *Manhattan Properties, Inc.* v. *Irving Trust Co.* (291 U. S. 320) contrary to the provability of future rent claims in bankruptcy, most of the efforts to obtain recognition of landlords' claims were focused on the courts. It was not until the existing law was authoritatively construed against them that landlords generally shifted their attention to the legislature.

(v) *Parties are not presumed to have contracted with a view to future changes in the law. And had that been the intention of these parties, they could easily have expressed it.*

As the court below remarked, the parties cannot be presumed to have been

> "contracting on the basis of a mere guess both as to the fact of any actual change in the statute and as to what it would be" (R. 396).

The same thought was expressed by the Court of Queen's Bench in *Baily* v. *De Crespigny*, L. R. 4 Q. B. 180, 186:

> "* * * there is nothing 'to prevent parties, if they choose by apt words to express an intention so to do, from binding themselves by a contract as to any future state of the law * * * but people in general

> must always be considered as contracting with reference to the law as existing at the time of the contract. * * * And the words shewing a contrary intention ought to be pretty clear to rebut that presumption.' To hold a man liable by words, in a sense affixed to them by legislation subsequent to the contract, is to impose on him a contract he never made."

If the parties had been so minded, it would have been an easy matter to have contracted for the contingency of which the petitioners now seek to take advantage. No better proof of this can be found than the testimony of the sole witness on the subject of the landlord's intention at the time. The petitioner Lorch had a substantial claim against the Debtor for back taxes in arrears since 1930, the payment of which his attorney tried to make a condition to the execution of the assignment agreement (R. 308). Failing this, the attorney advised Lorch to execute the assignment agreement containing the general release with the usual form of qualifying rider. Two and a half years later, however, this attorney testified that he had in mind to reserve for his client "*any* claims which might arise dependent upon *future* circumstances" (R. 307). Had such in fact been his intention, or the intention of any other of the petitioners, it would have been a simple matter to insert this very language in the agreements which now bar their claims.

The clause could have been thus adapted by the omission of the bracketed words, and the insertion of the few italicized words, in the following quotation:

> "Nothing in this Article shall be deemed a waiver by the landlord of the right to prove against

the Bankrupt Estate *or the Bankrupt* any [provable] claims to which [the Bankruptcy Court may adjudge] the landlord [is] *may be or become* entitled *under the Bankruptcy Act,* [but this shall not be deemed to render any claim a provable claim which is not otherwise such or to relieve the landlord from the necessity of proving and obtaining the allowance of any such claim or preclude the Trustee from contesting such proof or allowance]."

So adapted, the clause would have been thus simplified:

"Nothing in this Article shall be deemed a waiver by the landlord of the right to prove against the Bankrupt Estate or the Bankrupt any claims to which the landlord may be or become entitled under the Bankruptcy Act."

POINT III

REGARDLESS OF THE CORRECT INTERPRETATION OF THE RIDER, ALL THE PETITIONERS (EXCEPT *RUBEL* AND *LIVINGSTON*) ARE BARRED BY THE ASSIGNMENT AGREEMENTS, WHICH IN THEIR CASES WERE NOT QUALIFIED BY THE RIDER.

(A) By accepting assignments of their leases from the Trustee and the Debtor, and (except in the *Munk* case) by assuming all obligations thereafter to be performed by the Debtor, these 7 petitioners relinquished any further rights against the Debtor.

Each of the agreements entered into by these seven petitioners provided for

(i) the assignment by the Debtor to the landlord of the lease and the subleases made thereunder, together with the rents received, accrued and to accrue after bankruptcy,

and each of these seven agreements, except the Munk agreement, also contained

(ii) an assumption by the landlord of the Debtor's obligations under the lease.

On the face of these agreements it can scarcely be contended that the petitioners' leases were intended to or did survive against the Debtor for any purpose. The legal effect of such agreements (quite apart from the release clause) was definitely to bring to an end the Debtor's obligations as tenant, and the assignment of the lease and the turn-over of the property to the landlord in each case provided all the elements of a surrender both by express agreement and by operation of law. *Beall* v. *White*, 94 U. S. 382, 389; *McAdam on Landlord and Tenant*, §§ 318, 322; *Tiffany, Real Property* (2d Ed.) § 431.

As to surrender by agreement, there was clear intention on the part of the Debtor to relinquish all interest in the leasehold from the effective date of the agreement (September 1, 1932), coupled with expressed willingness of the landlord to take back his property. Moreover, as a matter of law, by taking over the sub-tenancies and thereafter treating the property as freed of any interest of the Debtor, the landlord was conducting himself in a manner wholly inconsistent with the continuance of lease liability on the part of the Debtor. *Lamson Consol. Store Service* v. *Bow-*

land, 114 Fed. 639, 641 (C. C. A. 6th); *In re Sherwoods, Inc.*, 210 Fed. 754, 759 (C. C. A. 2d).[11]

Moreover, in each case (except *Munk*), the unqualified assumption of all of the Debtor's obligations under the lease left the petitioner both the obligor and the obligee of the claim which he now asserts.

(B) The petitioners are in error in suggesting that the rider qualifying the release serves no function unless, contrary to its terms, it be treated as applying as well to the assignment and assumption provisions.

The qualifying rider in each case (except *Rubel, Livingston* and *Munk*[12]) is expressly limited in its effect to the article of the agreement containing the general release, viz.:

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[11]The petitioners suggest that the assignment agreements did not constitute surrenders because of the intention of the parties to preserve the subleases. But the decision on which they rely, *Metropolitan Life Ins. Co.* v. *Hellinger,* 272 N. Y. 24, only stands for the proposition that where a tenant assigns his subleases to the overlandlord a *merger* will not be inferred. There is, however, no principle of law that prevents a tenant, when turning over subleases to his overlandlord, from obtaining the benefits of the release from liability which ordinarily arise from surrender. Beginning with the leading case of *Eten* v. *Luyster,* 60 N. Y. 252, the New York courts have consistently held that upon surrender of the head lease the subtenant "becomes the immediate tenant of the original lessor" and the interest of the subtenant of the lessee continues as if no surrender has been made. As Judge Cardozo said in *Kottler* v. *New York Bargain House, Inc.*, 242 N. Y. 28, 37, as far as the sublessees are concerned, the surrender of the head lease is "equivalent to a transfer of the reversion".

[12]In the *Munk* case, the qualification, although applicable to the assumption clause as well as the release clause, did

> "Nothing in this Article [here was inserted the number of the article containing the release] shall be deemed a waiver by the Landlord of the right to prove * * *" (See R. 76).

Thus, the rider did not qualify the effect of the surrender of the lease as a result of its assignment back to the landlord.

The dissenting judge in the Circuit Court of Appeals completely nullified this distinction by the italicized words in the following sentence of his opinion:

> "Not only did the statement in the rider that there was 'no waiver by the landlord of the right to prove against the bankrupt estate any provable claim' limit the general release, but the rider cannot have the meaning intended unless it be taken to reserve against the bankrupt's estate any claims but for *the surrender and* general release" (R. 377—83 F. [2d] at p. 207).

Yet, under the rule that each phrase in a contract must be given effect (*O'Brien* v. *Miller,* 168 U. S. 287, 297), it would seem clear that, whatever the consequences, the qualification upon which the petitioners rely cannot be construed to be a qualification of the assignment provision of their agreements.

The argument to the contrary is that, if the qualification be limited (as it certainly is by its terms) to a qualification of the release provision alone, then it has no meaning

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not apply to the assignment clause. The *Rubel* and *Livingston* claims are, therefore, the only claims here involved whose disallowance depends solely upon a construction of the release, as distinguished from a determination of the effect of the entire agreement of which the release formed but a part.

at all, as its effect is entirely destroyed by the independent assignment provision.

But this is not so.

The assignment provision did not relieve the Debtor or its bankrupt estate from such claims as had already become provable in bankruptcy, notably claims for rent accrued prior to bankruptcy. Neither did this provision bar the assertion of future rent claims based on the theory (not finally rejected by this Court until 1934) that bankruptcy constituted an anticipatory breach of leases, as well as of contracts affecting personality, (*cf. Central Trust Company* v. *Chicago Auditorium,* 240 U. S. 581). Both types of claims might be proven irrespective of a surrender by assignment. But the release article released the Debtor and the bankrupt estate from *all* claims, whether then in existence or to accrue in the future.

Accordingly, the qualifying rider served the vital function of negativing the waiver of the landlord's right to assert already existing claims. Without the rider such claims would be cut off because of the release clause, but not because of the assignment clause. With the rider the release cut off all existing claims which were not *then* provable.

POINT IV

THE QUESTION WHETHER THE REJECTION OF A LEASE CONSTITUTES *WITHOUT MORE* THE BASIS OF A CLAIM UNDER THE STATUTE HAS ALREADY BEEN CONSIDERED IN THE *CITY BANK FARMERS TRUST COMPANY* CASE (NO. 260).

The petitioners devote considerable space in their brief to the proposition that the Circuit Court of Appeals erron-

eously construed the provisions in Section 77B relating to landlords' claims. The essence of their argument is that in limiting the landlord to "a claim against a debtor which the substantive law of landlord and tenant recognizes as an enforceable claim" (R. 373), the court below overlooked the alternative claim provided by the statute "for injury resulting from the rejection of an unexpired lease".

The petitioners, therefore, invite the Court to consider the question whether the rejection of a lease constitutes the basis of a claim under the statute, irrespective of continued liability on the part of the Debtor under the substantive law of landlord and tenant. The Trustee's position with respect to this question is set forth in its brief in the *City Bank Farmers Trust Company* case (No. 260), which has been assigned for argument in advance of this case.

CONCLUSION

We respectfully submit that the judgment of the Circuit Court of Appeals should be affirmed.

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APPENDIX

Statute Involved

"The term 'creditors' shall include for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims of whatever character against the debtor or its property, including claims under executory contracts, whether or not such claims would otherwise constitute provable claims under this Act. The term 'claims' includes debts, securities, other than stock, liens, or other interests of whatever character. For all purposes of this section unsecured claims which would have been entitled to priority over existing mortgages if a receiver in equity of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition or answer under this section, shall be entitled to such priority, and the holders of such claims, and of other claims, if any, of equal rank, shall be treated as a separate class of creditors. In case an executory contract or unexpired lease of real estate shall be rejected pursuant to direction of the judge given in a proceeding instituted under this section, or shall have been rejected by a trustee or receiver in bankruptcy or receiver in equity, in a proceeding pending prior to the institution of a proceeding under this section any person injured by such rejection shall, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, be deemed to be a creditor. The claim of a landlord for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall be treated as a claim ranking on a parity

with debts which would be provable under section 63 (a) of this Act, but shall be limited to an amount not to exceed the rent, without acceleration, reserved by said lease for the three years next succeeding the date of surrender of the premises to the landlord or the date of reentry of the landlord, whichever first occurs, whether before or after the filing of the petition, plus unpaid rent accrued up to such date of surrender or reentry: * * *." (Bankruptcy Act of July 1, 1898, as amended, Section 77B (b) (10); 11 U. S. C. A. Sec. 207 (b) (10).)